Muhammad Khairuanuar bin Baharuddin v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05(M)-143–04 OF 2021
KAMALUDIN MD SAID, HASHIM HAMZAH AND AZMAN ABDULLAH JJCA
6 JUNE 2023

Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused convicted under s 302 of Penal Code for offence of murder — Whether accused had committed murder — Whether accused had intention to inflict injury on deceased — Whether there were special degrees of mens rea referred to in s 300(d) of Penal Code — Whether there was evidence of premeditation or pre-existing malice — Whether main witness was reliable witness — Whether evidence of main witness admissible — Whether accused should have been convicted for culpable homicide not amounting to murder under s 304(b) of Penal Code instead of murder under s 302 of Penal Code — Penal Code ss 299, 300(c), (d), 302 & 304(b)

The present appeal was in relation to the decision of the High Court judge ('the HCJ') in convicting the accused for the offence of murder and sentencing him to death under s 302 of the Penal Code ('the PC'). It was common in a murder case that a conviction against an accused was based on circumstantial evidence, the present case was not an exception. The accused was charged with the murder of a two-year-old child ('the deceased') which was put under his care at his request by the deceased's mother ('PW7') who was also the accused's wife. Based on the evidence given by PW12 who had conducted a postmortem on the deceased, the cause of death was due to severe head injury as a result of blunt force trauma to the head. The findings of the HCJ on the culpability of the accused was mainly based on the evidence of the accused's driver ('PW8') who testified, inter alia: (a) that the accused was last seen together with the deceased; (b) that he heard the deceased screamed at around 3pm of the day of the incident occurred; and (c) that the deceased was still alive at about 5.20pm and he saw the deceased lying down holding a milk bottle in front of the television after that. The HCJ had also considered the evidence of a doctor ('PW3') in Clinic Idzham who had performed cardiopulmonary resuscitation on the deceased before informing the accused who brought the deceased to the clinic that the deceased had passed away. There was also a testimony by PW7 that that the deceased always cried when she wanted to leave her in the care of the accused. Further, the HCJ had rejected the accused's defence that there were two persons in the place where the offence was committed ie, the accused and PW8 and that it was possible that PW8 who could have killed the deceased. At the end of the trial, the HCJ held that the totality of the

A circumstantial evidence pointed to one and only one conclusion and that was the accused who was responsible for the murder of the deceased, hence the conviction and sentence by the HCJ. In the present appeal, the plank of the accused's case was still on the suggestion that the death of the deceased was not caused by the accused and that there was a possibility that the death of the B deceased was caused by someone else such as PW8.

Held, allowing the appeal:

(1) Based on the material facts together with the evidence tendered and guided by the decision of the Federal Court in the case of *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174, the court was of the view that in order to convict the accused under s 302 of the PC, the court had to satisfy that the accused had committed murder as provided under s 300 of the PC. In this regard, culpable homicide may not amount to murder: (a) where the evidence was sufficient to constitute murder, but one or more of the exceptions to s 300 of the PC applied; and (b) where the necessary degree of mens rea specified in s 299 of the PC was present, but not the special degrees of mens rea referred to in s 300 of the PC (see para 90).

(2) The court disagreed with the HCJ in his finding that the facts and circumstances raised strong inference that the accused had intention of inflicting bodily injury to the deceased and the bodily injury inflicted was sufficient in the ordinary course of nature to cause death pursuant to s 300(c) of the PC. The court found that the prosecution failed to prove the element of intention in this case. There was nothing in the facts suggested that the accused had an intention to inflict the injury to the deceased (see para 91).

(3) The court found that the special degrees of mens rea referred to in s 300(d) of the PC was not satisfied. The evidence by the prosecution was lack in proving that the accused acquired knowledge that his act was so imminently dangerous that it must in all probability cause death, or such bodily injury as was likely to cause death. In this regard, the court's finding was based on the fact that: (a) PW8 heard the deceased screamed at around 3pm; (b) PW8 testified that the deceased was alive at about 5.20pm; and (c) PW8 saw the deceased lying down holding a milk bottle in front of the television after that. Therefore, the court's inference from this evidence of PW8 was that the accused was lack of knowledge that the injury inflicted on the deceased was imminently dangerous that it must in all probability cause death or likely to cause death (see para 92).

(4) On totality of the evidence, the court found that the HCJ was wrong in convicting the accused of murder under s 302 of the PC. The court agreed with the HCJ on the application of the 'last seen together principle' but only to a conviction for the lesser offence of culpable

homicide not amounting to murder under s 304(b) of the PC was justified considering the weight of the evidence tendered by the prosecution. There was certainly no evidence of any premeditation or pre-existing malice on the accused towards the deceased (see paras 84–85).

(5) The defence argued that there were two persons in a place where an alleged offence was said to have been committed (ie, the accused and PW8) and the defence suggested that it was PW8 who had killed the deceased. However, the court was of the view that PW8's evidence was clearly admissible and that his evidence was neither self-exculpatory nor accusing the accused. PW8's evidence was only as to what was within his knowledge and nothing in the record stated that he was shaken when he was cross-examined. In this regard, the court had reminded themselves that as a trier of fact, the HCJ had the audio-visual advantage reserved to a trial judge. In the circumstances, the HCJ had correctly examined the evidence and had correctly applied the principles when assessing circumstantial evidence. Therefore, the court did not disturb the finding of the HCJ who relied on the evidence of PW8 since PW8 was held to be a reliable witness. The court further found that the accused failed to cast reasonable doubt on the truth of the prosecution's case (see paras 93–95).

(6) Based on the above findings, the court found that the sentence and conviction against the accused under s 302 of the PC was not justified and palpably unsafe. Accordingly, the court set aside the conviction and sentence for murder and substituted it with a conviction for culpable homicide not amounting to murder under s 304(b) of the PC. After considering the mitigation plea and submissions in reply, the court imposed a sentence of ten years' imprisonment with effect from 9 January 2018 (see para 96).

[Bahasa Malaysia summary

Rayuan ini adalah berhubung dengan keputusan hakim Mahkamah Tinggi ('HMT') dalam mensabitkan tertuduh atas kesalahan membunuh dan menjatuhkan hukuman mati di bawah s 302 Kanun Keseksaan ('KK'). Sudah menjadi kebiasaan dalam kes pembunuhan bahawa sabitan terhadap tertuduh adalah berdasarkan keterangan mengikut keadaan, kes semasa tidak terkecuali. Tertuduh didakwa membunuh seorang kanak-kanak berusia dua tahun ('si mati') yang diletakkan di bawah jagaannya atas permintaannya oleh ibu si mati ('PW7') yang juga merupakan isteri tertuduh. Berdasarkan keterangan PW12 yang telah menjalankan bedah siasat ke atas si mati, punca kematian adalah akibat kecederaan parah di kepala akibat trauma tumpul di bahagian kepala. Penemuan HMT mengenai kesalahan tertuduh adalah berdasarkan keterangan pemandu tertuduh ('PW8') yang menyatakan, antara lain: (a) bahawa tertuduh kali terakhir dilihat bersama dengan si mati; (b) bahawa dia mendengar si mati menjerit sekitar pada jam 3 petang hari kejadian; dan

(c) bahawa si mati masih hidup pada kira-kira jam 5.20 petang dan dia melihat si mati baring sambil memegang botol susu di hadapan televisyen setelah itu. Hakim Mahkamah Tinggi juga telah mempertimbangkan keterangan seorang doktor ('PW3') di Klinik Idzham yang telah melakukan resusitasi kardiopulmonari ke atas si mati sebelum memaklumkan tertuduh yang sebelumnya telah membawa si mati ke klinik tersebut bahawa si mati telah meninggal dunia. Terdapat juga keterangan PW7 bahawa si mati selalu menangis apabila dia mahu meninggalkan si mati dalam jagaan tertuduh. Selanjutnya, HMT telah menolak pembelaan tertuduh bahawa terdapat dua orang di tempat jenayah tersebut dilakukan iaitu tertuduh dan PW8 dan terdapat kemungkinan bahawa PW8 boleh membunuh si mati. Pada akhir perbicaraan, HMT berpendapat bahawa keseluruhan keterangan mengikut keadaan hanya menunjukkan satu kesimpulan sahaja iaitu tertuduh yang bertanggungjawab ke atas pembunuhan si mati, justeru sabitan dan hukuman oleh HMT. Dalam rayuan ini, intipati kes tertuduh masih berkisar pada cadangan bahawa kematian si mati bukan berpunca daripada tertuduh dan terdapat kemungkinan kematian si mati disebabkan oleh orang lain seperti PW8.

Diputuskan, membenarkan rayuan:

(1) Berdasarkan fakta material berserta keterangan yang dikemukakan dan berpandukan keputusan Mahkamah Persekutuan dalam kes *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174, mahkamah berpandangan bahawa untuk mensabitkan tertuduh di bawah s 302 KK, mahkamah perlu berpuas hati bahawa tertuduh telah melakukan pembunuhan seperti yang diperuntukkan di bawah s 300 KK. Dalam hal ini, mematikan orang dengan salah mungkin tidak terjumlah kepada membunuh: (a) jika keterangan adalah mencukupi untuk membuktikan pembunuhan, tetapi satu atau lebih pengecualian kepada s 300 KK terpakai; dan (b) jika tahap mens rea yang diperlukan yang dinyatakan dalam s 299 KK ada, tetapi bukan tahap khas mens rea yang dirujuk dalam s 300 KK (lihat perenggan 90).

(2) Mahkamah tidak bersetuju dengan HMT dalam penemuannya bahawa fakta dan keadaan membangkitkan kesimpulan yang kukuh bahawa tertuduh mempunyai niat untuk menyebabkan sesuatu bencana tubuh kepada si mati dan bencana tubuh yang dikenakan adalah mencukupi pada lazimnya untuk menyebabkan kematian menurut s 300(c) KK. Mahkamah mendapati pihak pendakwaan gagal membuktikan unsur niat dalam kes ini. Tiada apa-apa dalam fakta menunjukkan bahawa tertuduh mempunyai niat untuk mendatangkan kecederaan kepada si mati (lihat perenggan 91).

(3) Mahkamah mendapati tahap khas mens rea yang dirujuk dalam s 300(d) KK tidak dipenuhi. Keterangan oleh pihak pendakwaan adalah kurang

dalam membuktikan bahawa tertuduh mempunyai pengetahuan bahawa perbuatannya adalah sebegitu sekali berbahaya hingga mungkin sekali menyebabkan kematian, atau bencana tubuh yang mungkin menyebabkan kematian. Dalam hal ini, dapatan mahkamah adalah berdasarkan fakta-fakta bahawa: (a) PW8 mendengar si mati menjerit sekitar jam 3 petang; (b) PW8 memberi keterangan bahawa si mati masih hidup kira-kira jam 5.20 petang; dan (c) PW8 melihat si mati baring sambil memegang botol susu di hadapan televisyen setelah itu. Oleh itu, inferens mahkamah daripada keterangan PW8 ini adalah bahawa tertuduh tiada pengetahuan bahawa kecederaan yang dikenakan ke atas si mati adalah sebegitu sekali berbahaya hingga mungkin sekali menyebabkan kematian atau mungkin menyebabkan kematian (lihat perenggan 92).

(4) Berdasarkan keseluruhan keterangan, mahkamah mendapati bahawa HMT adalah salah dalam mensabitkan tertuduh membunuh di bawah s 302 KK. Mahkamah bersetuju dengan HMT mengenai pemakaian 'prinsip terakhir dilihat bersama' tetapi hanya untuk sabitan bagi kesalahan yang lebih ringan iaitu mematikan orang dengan salah yang tidak terjumlah kepada kesalahan membunuh orang di bawah s 304(b) KK yang lebih wajar dengan mengambil kira pemberatan keterangan yang dikemukakan oleh pihak pendakwaan. Sememangnya tiada keterangan berkaitan apa-apa perancangan atau niat jahat yang sedia ada pada tertuduh terhadap si mati (lihat perenggan 84–85).

(5) Pihak pembelaan berhujah bahawa terdapat dua orang di tempat di mana kesalahan yang dikatakan telah dilakukan (iaitu, tertuduh dan PW8) dan pihak pembelaan mencadangkan bahawa PW8 yang telah membunuh si mati. Bagaimanapun, mahkamah berpandangan bahawa keterangan PW8 jelas boleh diterima dan keterangannya bukan keterangan yang melepaskan diri sendiri mahupun menuduh tertuduh. Keterangan PW8 hanyalah apa yang ada dalam pengetahuannya dan tiada dalam rekod menyatakan bahawa dia tergugat apabila dia disoal balas. Dalam hal ini, mahkamah telah mengingatkan diri mereka sendiri bahawa sebagai pembicara fakta, HMT mempunyai kelebihan audio-visual dikhaskan kepada hakim bicara. Dalam keadaan tersebut, HMT telah meneliti keterangan dengan betul dan telah menggunakan prinsip dengan betul semasa menilai keterangan ikut keadaan. Oleh itu, mahkamah tidak mengganggu penemuan HMT yang bergantung kepada keterangan PW8 memandangkan PW8 diputuskan sebagai saksi yang boleh dipercayai. Mahkamah selanjutnya mendapati tertuduh gagal mengemukakan keraguan munasabah terhadap kebenaran kes pendakwaan (lihat perenggan 93–95).

(6) Berdasarkan dapatan-dapatan di atas, mahkamah mendapati bahawa hukuman dan sabitan terhadap tertuduh di bawah s 302 KK adalah tidak

wajar dan nyata tidak selamat. Sehubungan itu, mahkamah mengenepikan sabitan dan hukuman bagi pembunuhan dan menggantikannya dengan sabitan bagi kesalahan mematikan dengan salah yang tidak terjumlah kepada membunuh di bawah s 304(b) KK. Selepas mempertimbangkan hujahan mitigasi dan hujahan jawapan, mahkamah menjatuhkan hukuman penjara sepuluh tahun berkuat kuasa 9 Januari 2018 (lihat perenggan 96).]

Cases referred to

Liow Siow Long v PP [1970] 1 MLJ 40; [1969] 1 LNS 98 (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
Mickelson Gerald Wayne v PP [2022] 6 MLJ 118, FC (folld)
Munesuaran a/l Ramasamy lwn Pendakwa Raya [2015] MLJU 1958; [2016] 2 CLJ 210, CA (refd)
Munusamy v PP [1987] 1 MLJ 492; [1987] CLJ Rep 221, SC (refd)
PP v Ahmad Rizal bin Umar [2017] 6 MLJ 279; [2017] 1 LNS 1069, CA (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2005] 2 MLRA 590, FC (refd)
PP v Muhamad Nasir bin Shaharuddin & Anor [1994] 2 MLJ 576; [1992] 3 CLJ Rep 408, HC (refd)
R v Abbot [1955] 2 All ER 899 (refd)
Romli Ali v PP [2017] 6 CLJ 652, CA (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (folld)
Tua Kin Ling v Public PP [1970] 2 MLJ 61 (refd)

Legislation referred to

Criminal Procedure Code s 180(3)
Evidence Act 1950 ss 90A, 114(g)
Penal Code [IN] s 304
Penal Code ss 299, 300(c), (d), 302, 304(b)

Appeal from: *Public Prosecutor v Muhammad Khairuanuar bin Baharuddin* [2021] MLJU 651 (High Court, Kuala Lumpur)

Afifuddin bin Ahmad Hafifi (Salehuddin Saidin & Assoc) for the appellant.
Mohd Mukhzany Fariz bin Mohd Mokthar (Attorney General's Chambers) for the respondent.

Azman Abdullah JCA:

INTRODUCTION

[1] This is an appeal by the appellant, Muhammad Khairuanuar bin Baharuddin ('the accused'), against the decision of the High Court which found that the accused was guilty of the charge and convicts the accused on the charge under s 302 of the Penal Code. The accused was sentenced to death.

[2] After reading the written submissions filed, hearing both parties orally and perusing the records of appeal, we unanimously decided to allow the appeal.

THE PROSECUTION CASE

[3] The charge against the accused reads as follows:

> Bahawa kamu pada 6 November 2015, antara jam 7.30 pagi hingga 7.30 malam, bertempat di sebuah rumah di alamat F-03, Lojing Heights 1, Jalan 1/27C, Seksyen 5; Wangsa Maju, di dalam Wiiayah Persekutuan Kuala Lumpur telah membunuh Hanis Amanda bt Mohd Zafil (No.Mykfd: 130814-10-2352) dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum dibawah Seksyen 302 Kanun Keseksaan.

[4] The learned High Court judge had outlined the material facts of prosecution case in his grounds of judgment which we respectfully adopt them with modification whenever necessary.

[5] To prove their case, the prosecution called 15 witnesses.

[6] The material facts adduced by the prosecution disclosed that the deceased was the youngest child of Farah Adiba bt Md Othman ('PW7') and she was born on 13 August 2013. PW7 had another child named FA who was born in 2011. The father of both the deceased and FA is Mohd Zafil bin Ibrahim ('PW1'). PW1 and PW7 however, divorced in 2013.

[7] PW7 thereafter the divorce married the accused who is the accused in this case in June 2015.

[8] PW1 also married to Tengku Aisya bt Tengku Nong Idris ('PW2'). According to both PW1 and PW2, they last saw the deceased on 19 October 2015. This was just after the deceased and FA spent two days with them before both the deceased and FA were sent back to PW7.

[9] PW1 and PW2 had noticed that there were bruises on the body of the

deceased whilst she was in their care between 17 October 2015 and 19 October 2015. In particular, PW1 noticed bruises on the ribs and the thighs of the deceased. PW1 also testified that the deceased had told him, 'Akit ... akit, Papa Bi buat'. This happened whenever PW2 wanted to wash the deceased after she passed motion or wanted to give the deceased a bath. According to PW1, 'Papa Bi' mentioned by the deceased is referred to the accused.

[10] PW2 also testified that she saw bruises to the side of the deceased's forehead and the ribs when the deceased was bathing. As she washed the deceased's bottom, the deceased remarked, 'akit ... akit ... Papa Bi wat'. PW2 had inquired of PW7 about the bruises and was told that PW7 was unaware of this because it was her husband at the time, the accused, who took care of the deceased.

[11] PW7 testified that the accused had repeatedly urged her to let him take care of the deceased through his WhatsApp messages. PW7 said that she took the deceased from PW1 and handed her to the care of the accused on 18 October 2015 after he requested for her. The accused also told PW7 that there was no need to send the deceased to the babysitter.

[12] According to PW7, on the 4 November 2015, when she left the deceased with the accused, the deceased screamed and cried. PW7 said that each time she left the deceased with the accused, the deceased would cry. PW7 said that she gave in to the accused's constant demands to look after the deceased because the accused was her husband at the time and that she trusted him.

[13] PW7 also said that it was the accused who took care of the deceased and not the accused's driver), Mohd Rizal ('PW8'). It was whilst the deceased was in the care of the accused that she died on 6 November 2015.

[14] Another evidence led by the prosecution was about Roslan bin Idris ('PW10') and his son, Mohd Alif Haikal ('PW11') who had together with PW8, the deceased and the accused travelled to Terengganu on 5 November 2015. The reason they went to Terengganu was that PW10 wanted to expand his farming business and he wanted to purchase cows at a low price. The accused advertised that he was in the business of selling cows and identified himself as K. According to PW11, while on the journey to Terengganu, the deceased sat on the accused's lap the whole time in the front passenger seat.

[15] They return back from Terengganu on 6 November 2015 to the accused's residence at No F-03, Lojing Heights 1, Jalan 1 /27C, Seksyen 5, Wangsa Maju, Kuala Lumpur. PW8 drove the vehicle and they reached the accused's residence at about 6.45am When they arrived, both PW8 and PW10

said that the deceased was carried by the accused from the car into the master bedroom. While PW8, PW10 and PW11 slept at the living room downstairs.

[16] PW10 and PW11 left the accused's residence to return to their hometown in Perak at around 8am. According to PW10, when they left, PW8 was still asleep on the sofa at the living hall.

[17] PW8 testified that at around 3pm, he awoke to the sound of a girl screaming. PW8 was sure that it was the voice of the deceased because he had heard the deceased scream before. PW8 often heard the screams of the deceased whenever the accused was bathing her. PW8 however, went back to sleep.

[18] PW8 woke up at about 5.20pm as he felt water dripping on his face from the ceiling. After PW8 placed a bucket under the dripping water, he went up to the master bedroom to inform the accused about the leakage. PW8 knocked on the accused's room door about five times before the accused opened the door dressed only in shorts. PW8 saw the deceased at the edge of the bed in a slightly bent position and was looking at him.

[19] After PW8 informed the accused about the leakage and the dripping water, the accused instructed PW8 to go to the management office to complain about that. The management office was located about 50metre from the accused's residence. According to PW8, it took only seven minutes to reach there.

[20] While PW8 went to the management office, the deceased was left alone with the accused. PW8 said that there was no one else in the house at the time.

[21] After that, PW8 alone had cleaned up the floor as the accused did not help him. PW8 saw the accused talking to PW9 who was the neighbour of the accused. PW8 confirmed that the accused had never left the house as both the accused's cars were in the porch.

[22] Further, PW8 said that while he was in the kitchen, the accused went upstairs and called out to PW8 anxiously. PW8 went upstairs and saw the deceased lying on the floor and her face and lips were bluish in colour. According to PW8, the accused was standing one and a half metres away from the deceased.

[23] PW8 urged the accused to send the deceased to the hospital. PW8 upon the instructions of the accused then carded the deceased to the car while the accused drove the car to the clinic. PW8 said at the time, the deceased was making a choking sound and there was residue of milk coming out of her nose

and mouth. They arrived at Klinik Idzham at No 9135 Jalan 4, Taman Melawati, 53100, Kuala Lumpur which about 2.5km from the accused's house at around 7.45pm.

[24] PW8 said that the deceased was brought into the said clinic through the back door. Dr Md Idzam ('PW3') testified that usually the back door to the clinic was locked but as the accused banged on the door, his staff opened the door.

[25] PW3 testified that the accused requested him to issue a death certificate in order to bury the deceased after she was pronounced dead. PW3 however refused and told the accused to bring the deceased to a hospital for a post mortem as PW3 suspected a case of child abuse. The accused then told PW3 that he was a policeman and insisted that the deceased's death certificate be issued to which PW3 replied that he ought then to know the procedure.

[26] According to Dr Mohd Hafizam ('PW12') who conducted a post mortem on the deceased at the Kuala Lumpur Hospital, he testified that the cause of death of the deceased was due to severe head injury as a result of blunt force trauma to the head. PW12 also issued a post mortem report ('exh P12'). According to the post mortem report (exh P12) also, there was a scar in the anus of the deceased at the *5* and *7* o'clock position.

FINDINGS OF THE LEARNED JUDGE AT THE CLOSE OF THE PROSECUTION'S CASE

[27] At the the close of the prosecution's case, the learned High Court judge found that the prosecution had successfully proven a prima facie case against the accused as per the charge. As a result, the accused were ordered to enter their defence.

[28] In arriving at this decision, the learned High Court judge made his findings of fact as follows:

Ingredient 1 — The deceased is dead.

(a) the body of the deceased was identified by her biological father, PW1, at Kuala Lumpur Hospital. The fact of the deceased's death was also evident from the post mortem report (exh P12). The death certificate of the deceased was also tendered as ('exh P13') by Inspector Nur Helmi ('PW14').

(b) there was also no serious dispute regarding the identity of the deceased. The prosecution had therefore proven the first ingredient of the offence.

Ingredient 2 — The deceased had died as a result of the injuries she sustained.

(c) PW12 testified that on 7 November 2015 at around 3.10pm, he conducted

a post mortem on the deceased at the Kl Hospital and further said that the cause of death was due to severe head injury as a result of blunt force trauma to the head as also evident from the post mortem report (exh P12). A

(d) PW12 aiso said that the injuries as shown in photographs No 57 and No 60 in exh P5 were extremely severe and this had caused the death of the deceased. PW12 said that there were four serious injuries one of which was the fatal injury. The injury to the back of the head had the most impact. PW12 confirmed that the injuries to the head were not consistent with the deceased having fallen down on her own. B

(e) evidence by PW12 above was sufficient for the prosecution to prove the second ingredient of the offence. C

Ingredient 3 — The injuries to the deceased were caused or was the result of the act of the accused.

(f) it is not in dispute that the prosecution evidence is circumstantial in nature because there is no direct evidence against the accused. Where the evidence is circumstantial J certain principles of law are called into operation. D

(g) from the cases referred, it is the conclusion of the learned High Court judge that although a conviction can be sustained by reliance on circumstantial evidence, it must admit of no other possibility other than that it was the accused who committed the murder. The burden upon the prosecution is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused and if there are gaps in it, then it is not sufficient. E

(h) according to the post mortem report (exh P12) there was a scar in the anus of the deceased at the five and seven o'clock position. F

(i) the persistence of the accused in wanting to take custody of the deceased in particular is also a relevant fact to take into account. PW7 also had another child, namely FA but there was no request from the accused to also look after her but instead only focussed his attention on the deceased. PW7 also said that the accused had never asked about Fatin Arissa. According to PW7, the requests from the accused to look after the deceased came after two months of not having any communication with him. G

(j) this led to the reasonable inference that there existed an unnatural and unhealthy desire on the part of the deceased in wanting to take care of the deceased for reasons best known to him. H

(k) besides, PW8 also testified that he often heard the screams of the deceased whenever the accused was bathing her. This is in stark contrast to the evidence of PW5 who said that every time he bathed the deceased and her sister, they would enjoy the bath and were always laughing at the time.

(l) thus, the inference that can be made here is that the deceased had for some reason developed an aversion to bathing whenever it was the accused person who gave her a bath. I

(m) on the day the deceased death, PW8 said that only the accused and the deceased were at home when he went to the management office. PW8 also said

A that at all material times, the accused had never left the house as he said that both of the accused's cars were still in the porch. PW7 had also stated that it was the accused and not PW8 who actually looked after the deceased during the time that the deceased was placed in the care of the accused.

B (n) from the available evidence a reasonable inference could be made that there was a connection between the death of the deceased and the accused actions as the deceased was proven to have been in the care of the accused at the material time.

C (o) the reasonable inference can also be made that the deceased met her death at the hands of the accused whilst in his sole custody thus triggering the application of the 'last seen together theory'. The learned High Court judge referred to the case of *Rakesh Kumar a/l Thangagrajoo lwn Pendakwa Raya dan satu lagi rayuan* [2017] MLJU 618; [2017] 1 LNS 502 which discussed the theory. The authority neatly and succinctly states that where an accused is fast seen with the deceased, 'in the absence of any plausible explanation by the accused, it can lead to a presumption of guilt although this is not necessarily conclusive'.

D

(p) the application of the 'last seen together principle' on, the facts here means therefore that the prosecution is exempted from having to prove the exact happening of the incident as the accused himself would have special knowledge of the incident and thus would bear the burden of proof.

E

(q) an analysis of the facts makes it clear that the deceased died whilst in the care of the accused. Although the evidence was that the accused's driver was in the accused's house at the time, the deceased was occupying the master bedroom with the accused. It was then incumbent upon the accused to provide a plausible explanation as to how the deceased met her death failing which a presumption of guilt would arise against him.

F

(r) the notice of alibi given by the accused ('exh D4') which stated that the water leakage occurred between 2.30pm to 3pm and PW8 had spent a longer period of time in the house as compared to the accused does not assist him in this respect.

G

(s) PW9 in his testimony said that the water leakage occurred between 5pm to 5.30pm and he remembers this because that was the time he returned from his Asar prayers. PW8 also testified that the water leak occurred around 5.20pm.

(t) the defence had also suggested that the accused had gone out to the AEON Big supermarket to purchase some items and therefore while he was out, PW8 was the only one in the house with the deceased. However, PW8 testified that if the accused had left the house, he would have known since he observed that both the accused's cars were still in the porch.

H

(u) the prosecution case also disclosed certain relevant conduct on the part of the accused upon his arrival at Klinik Idzham. The conduct of the accused, in bringing the deceased through the back door of the clinic and insisting that PW3 issue a death certificate, constitutes relevant conduct within the meaning of s 8 of the Evidence Act 1950 ('the EA'). It entitled the court to make an inference that the accused firstly, did not want to attract too much attention when he brought the deceased through the back door of the clinic and secondly, that he

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wanted to avoid a post mortem by insisting upon a death certificate from PW3 so he could hasten the burial process.

(v) it is also of significance that PW3 was of the view that the injuries sustained by the deceased was due to suspected child abuse. This is consistent with the evidence of PW7 who said that she noticed bruises on the deceased when she was in the care of the accused. Other relevant conduct on the part of the accused is the evidence of PW7 that the accused objected to the conduct of a post mortem on the deceased and had requested PW7 to prevail upon her doctor friend to influence and change the result of the post mortem. PW7 also testified that the accused told a pathologist by the name of Dr Faten (not PW12) to only conduct the post mortem on the chest as the reason for the death was due to breathlessness 'sesak nafas' and that it was not necessary to open up the other parts of the body.

(w) this evidence also entitled the court to infer that the accused knew where the injuries inflicted were and the further inference that by wanting to avoid the post mortem of the head region had sought to conceal the true cause of death and to avoid any connection between these injuries and himself.

(x) all of the above evidence when taken cumulatively, amounted to sufficient circumstantial evidence that pointed to the fact that it was the accused and him alone who was responsible for inflicting the fatal injuries on the deceased. The prosecution had thus proven he third ingredient of the charge.

Ingredient 4 — In inflicting the injuries upon the deceased, the accused was possessed with the requisite, intention under s 300(a), (b), (c) or the requisite knowledge under (d) of the Penal Code.

(y) the facts and circumstances raised the strong inference that the accused had intention of inflicting bodily injury to the deceased and the bodily inflicted was sufficient in the ordinary course of nature to cause death pursuant to limb (c) to s 300 of the Penal Code. Given the fact that accidental death was ruled out, the prosecution had thus successfully proven this ingredient of the charge against the accused.

[29] Besides the findings of the learned High Court judge on the ingredients of the offence, the learned High Court judge also analysed other issues raised by the defence as follows:

Doubts regarding the accuracy of exh P8 and exh P9

(a) the defence submitted that exh P8 which is the letter from Klinik Idzham written by PW3 dated 13 October 2016 and exh P9 which is the Patient Card which contained notes regarding sexual, harassment, were doubtful documents. This is because P8 was done almost a year after the death of the deceased upon the instructions of the second investigation officer ('PW13').

(b) as a result of this long lapse in time, it was submitted that there were several discrepancies one of which is that although it was in fact the accused that brought the deceased to the clinic it is stated in P8 that it was PW1 who brought the deceased.

(c) PW3 also contradicted PW4, who was his clinic assistant, in that PW4 said that PW3 was at his clinic after 9pm, whereas PW3 claims that he went home and had no knowledge of the happenings in his clinic after 9pm.

(d) it was also submitted that although PW3 said in evidence that the deceased had already passed away when she was brought into his clinic, in which he contradicted himself by stating that he performed CPR on the deceased. This contradicts his report at P8.

(e) it was further submitted that PW3's report as to the presence of the deceased's blood contradicted the testimony of the photographer and that of PW15 which was that there was no presence of blood stains.

(f) the defence also put to PW3 that exh P9 was written at two different times, the first being on 6 November 2015 and the second at a later date. This was because some words appeared to have inserted afterwards. It was further submitted that in spite of his suspicion over the death of the deceased, PW3 failed to lodge a police report regarding this.

(g) with regard to this issue, the learned High Court judge is of the view that Notwithstanding all of the above, the testimony of PW3 regarding the condition in which the deceased was brought in by the accused and his observation of her condition based upon hrs oral testimony and his demeanour was reliable. Whatever discrepancies there may have been could also be attributable to PW3's lapse in memory given his advanced age and the lapse of time from when he saw the deceased until the date of the trial. These discrepancies did not prejudice the main plank of the prosecution case which is that the deceased met her end white in the care of the accused and that the cause of death was stated to be blunt force trauma to the head which was ruled out to be accidental in nature.

(h) the learned High Court judge further stated that more significantly, the evidence of PW3 which stated that the accused brought the deceased through the back door of the clinic and that he asked PW3 for a death certificate to be issued coupled with the threat to PW3 that he was a policeman enabled the inference to be made that the accused knew the cause of injuries to the deceased.

Issue regarding the mop

(i) PW8 in his testimony said that he had at first told the truth about what happened to the police. He however then said that after he was beaten up, he made up the story about a mop being used as the murder weapon as he could not endure the beatings inflicted on him by the police any further. PW15 who had examined the mop found it to be light and concluded that it could not have been the murder weapon.

(j) the defence submitted that as the said mop was not produced, the adverse presumption under s 114(g) of the Evidence Act 1950 ('the EA') ought to be invoked.

(k) the learned High Court judge was of the view that PW8 in admitting that he only made up the fact that the mop was used in the murder because he could no longer endure the beatings of the police puts an end to the matter. The mop was not instrumental in the death of the deceased. No other weapons were

introduced as being connected with the death of the deceased. The pathologists report P12 also did not state that the blunt force trauma could only have been caused by a weapon of some sort. Therefore, the fact raised by learned counsel that no mop or murder weapon was produced did not prejudice the prosecution case and neither did the non-production of the mop attract the adverse presumption under s 114(g) of the Evidence Act.

Preliminary objection with regard to the time stated in the charge

(l) learned defence counsel also raised a preliminary objection ('PO') against the amended charge in respect of the time stated which is at 7am to 7pm, on 6 November 2015, whereas the prosecution evidence places the time of the murder between 12pm and 3pm on the same day. They submitted that this was based on the evidence of PW15 who testified that the accused and the deceased were in the master bedroom until noon which he concluded from his investigations was the time that the screams of the deceased were heard. It was therefore submitted that the amended charge ought to have been amended to reflect this time period which is 12 noon to 3pm.

(m) the learned High Court judge said that he did not see how the time frame stated in the charge along with the other particulars stated therein gives rise to any prejudice to the defence of the accused. Further, s 156 of the CPC states inter alia that no error or omission in stating the particulars in a charge shall be regarded as material unless the accused is misled by such error or omission. It cannot be the case here that the accused was misled as he could and did in fact raise an alibi in this case. Under the circumstances therefore, there was no merit to the submission by the defence on this issue.

PW7's Facebook postings

(n) PWT's Facebook ('FB') postings regarding, the deceased's death was merely her manner of venting her frustration and dealing with her grief due to the deceased's death.

(o) the testimony of PW7 in court nevertheless stood to be assessed based upon her credibility as to the material events that transpired. The material consideration was whether her sworn evidence in court held up to curial scrutiny. The FB postings therefore does not necessarily cast doubt on the testimony of PW7 in court.

Failure to produce the accused's Blackberry phone

(p) learned counsel for the accused submitted that the failure to produce the accused's Blackberry phone because its whereabouts could not be accounted for was prejudicial to the accused as this could have refuted PWT's testimony that the accused had sent messages requesting that he be allowed to look after the deceased.

(q) the evidence however in respect of these requests from the accused placed reliance upon the oral testimony of PW7 and not on the presence or absence of the Blackberry messages. Therefore, the failure to produce the Blackberry did not prejudice the prosecution case. The failure to produce the Blackberry was also due to other factors and not to deliberate suppression of evidence on the part

of the prosecution and thus did not warrant the invocation of the adverse presumption under s 114(g) of the Evidence Act 1950 against the prosecution.

Failure to call Fatin Sara Hafizaa and the accused's aunty

(r) Fatin Sara Hafizaa is the first wife of the accused. Her involvement in the murder of the deceased however can be ruled out as PW15's investigations revealed that she left the accused's house for work in the early morning on 6 November 2015 after the arrival of the accused back from Terengganu. This was also consistent with the testimony of PW10. The said Fatin Sara Hafizaa was nevertheless offered to the defence at the conclusion of the prosecution case.

(s) the of aunty the accused had followed the accused and the others when they went to Terengganu but got off in Kuantan on 5 November 2015. She did not accompany the entourage when they came back from Terengganu to Kuala Lumpur.

(t) the learned High Court judge held that the involvement of these two witnesses in the death of the deceased can therefore safely be ruled out and there is also no cause for invocation of the adverse presumption under s 114(g) of the Evidence Act 1950 against the prosecution.

PW12's evidence that the injuries to the deceased happened less than 72 hours

(u) the defence submitted that since the injuries to the deceased could have occurred within the last 72 hours of her life, it is possible for her to have sustained those injuries in the last 72 hours of her life as opposed to the last 24 hours. Their reason was on the possibility that as the injuries were inflicted within a period of three days prior to the deceased's death, and the injuries could not have been caused by a one hit kill, someone else apart from the accused could have caused the injuries within that time.

(v) according to the learned High Court judge, the prosecution correctly pointed out that PW12 said that the injuries could have happened less than 72 hours and not up to 72 hours, namely, ' ia berusia kurang dari tiga hari'. It was also correctly pointed out by the prosecution that there was sufficient evidence based upon witnesses that the accused was with the deceased during this span of time ie less than 72 hours before the death of the deceased.

[30] Therefore, upon a maximum evaluation of the evidence, the learned High Court judge found that the prosecution had proven a prima facie case against the accused in respect of the charge as proffered pursuant to s 180(3) of the Criminal Procedure Code and the accused was called to enter on his defence.

THE DEFENCE CASE

[31] The accused elected to give sworn testimony by way of tendering a witness statement which was read out in court. In his defence, the accused stated that the charge against him was unfounded. The reasons being firstly,

that he did not commit the crime of which he is accused of, secondly, although he is accused of murdering the victim latest at 7.30pm, the death certificate places the time of death at 10.13pm. and thirdly, the prosecution had failed to adduce evidence as to how he allegedly murdered the deceased and what objects or weapons were allegedly used to do so.

[32] According to the accused's narrative, the deceased was still alive and was sleeping in his bedroom with him. The accused said that PW8 told him that he heard the screams of Amanda ('the deceased') at 3pm and not at 12 noon. The accused however said that he did not hear any screams as testified to by PW8 and that PW8 most probably was in a state of stupor 'khayal' at the time. The accused said that if there were screams, he would have heard it.

[33] The accused said that the accused said that at around 4.30 to 5.30pm, PW8 knocked on the door of his room to inform that the ceiling in the living hall was leaking and asked him to take a look at it. The accused then leaved the bedroom with the deceased. He brought the deceased to the television area as she wanted to watch television. PW8 was there as well and that the television was already switched on.

[34] After that, he and PW8 went to take a look at the leak in the ceiling of the living hall. The accused then said that he told PW8 he was going to see the landlady who was staying in the vicinity and be also told PW8 to get hold of a plumber.

[35] The accused then left his house to go to the landlady's house. The accused said that he knocked and called out to Anne, the landlady, but nobody responded. The accused then sent a WhatsApp message to Anne with the image of the leaking roof. The accused said that Anne replied his message to say that she was not in whereupon the accused then left and proceeded back to his house.

[36] When he arrived back, he saw that PW8 had also arrived there from the security guard post. PW8 informed the accused that the security guard he had seen told him that he did not have the plumber's telephone number and was unaware of his whereabouts.

[37] At that time, the accused's immediate neighbour, Nik Azizan (PW9) returned home. When PW9 saw the accused and PW8 outside, he went over and asked what had happened. At the same time, the accused asked PW8 to go indoors to clean up the house. PW9 then went inside to see the leak and told the accused to look for a Chinese plumber and to contact him. PW9 then went back to his house. The accused then went to the swimming pool with the intention of looking for a plumber but he did not find any plumber there.

[38] Then the accused said that he remembered about the old mop in the house and that it was not sufficient for cleaning, up the house and that the mop was being used by PW8 in any event. Thus, he proceeded to the AEON Big hypermarket not far from his house to buy a new mop.

[39] The accused said that they had not yet eaten and he intended therefore to pack some food back and said that he had not told PW8 that he had left the house because he thought that he would be away for only a while and intended to return quickly to assist PW8 in cleaning the house without disrupting the latter's momentum in doing so. The accused said that at the time the deceased was also watching television and would not realise he was absent and should she look for him, PW8 would be there in any event.

[40] On the way to the AEON Big, the accused realised that he had forgotten to take his wallet. At the same time, he received a phone call from an unknown Chinese man telling him that the water supply had been shut and that no more water was coming down from the ceiling. He then returned to his house. As he entered the house, PW8 saw him but did not say anything. The accused said that at the time, PW8 was holding a mop and his hand phone. The accused then proceeded upstairs to take his wallet where he said that he was shocked to see the deceased lying on the floor as if she was having a seizure and sounding as though she was choking. He panicked and shouted for PW8.

[41] PW8 told the accused that he was unable to do anything. The accused said that several months before on 6 November 2015, the deceased had similar seizures but PW8 who was with her at the time was able to revive her after reciting some verses. PW8 carried the deceased intending to bring her to a clinic. The accused said his thought at the time was to bring the deceased to a doctor as soon as possible. The accused took his Volvo car key and said that he thought of finding the nearest clinic around the Melawati area as the KL General Hospital would be crowded.

[42] The accused drove fast and turned on the emergency lights but as it was after office hours, traffic was heavy. The accused said that he also beat traffic lights while sounding his horn. At the time, PW8 was carrying the deceased and she had difficulty breathing while also had milk foaming in her mouth.

[43] At the clinic, the doctor (PW3) instructed that the deceased be placed on a bed and asked what was wrong with her. The accused replied that she was 'stuck' and had difficulty breathing. The accused repeatedly pleaded with the doctor and the nurses to save the deceased.

[44] The accused further said that he remembered reaching Clinic Idzham at dusk because he, also recollected that PW3 told him that he had to perform his

Maghrib prayers first. The accused said that he was shocked to hear this as it was clear that this was an emergency but said that he had no choice in the matter.

[45] The accused and PW8 then went back home in order to get identification documents of the deceased as it was required by the nurse. When the accused arrived at his house, he noticed that his wife, Fatin, was home from work and she asked him why he looked dishevelled and was in a panic-stricken state. The accused told his wife what had happened and his wife told him that they did not have in their possession any identification documents of the deceased.

[46] The accused, PW8 and Fatin then rushed back to Clinic Idzham. Upon arrival there, the accused was informed that the deceased had passed away. The accused said that he felt angry and sad as he could not understand what had happened to the deceased.

[47] The accused said that he tried to call Farah but at first, she did not answer nor return his call. A while later, the accused managed to speak to Farah and he told her about the deceased. The accused said that while speaking to she started to cry and told him that she just had an abortion. The accused said he was shocked because he did not know that Farah was pregnant.

[48] The accused was then instructed to take the deceased body to KL General Hospital and was given a reference. He then proceeded to the KL General Hospital where upon arrival, he went to the emergency unit where a medical officer asked him what happened to the deceased to which he replied that she was 'stuck' with milk.

[49] The doctor wanted to perform a cardiopulmonary resuscitation (CPR) and told him to call out the deceased's name. The accused said that he called out the deceased's name three times after which he asked for permission to go out as he said that he was unable to bear seeing the deceased being subjected to CPR.

[50] The accused said that the allegations by PW3 that he introduced himself as a policeman and asked him to issue a death certificate was a baseless allegation and he denied this. If he had wanted to conceal the death, it would not make sense for him to take her to receive medical attention and also to bring her to the KL General Hospital for further examination.

[51] The accused also alleged that PW3 pretended to perform CPR although he was already certain that the deceased was dead at the time. The accused said that he is unable to understand why as a professional, PW3 would do such a thing.

[52] The accused said that Farah's allegation that he objected to a post mortem from being conducted on the deceased was untrue and that it was in fact Farah who objected to the conduct of a post mortem.

[53] The accused also said that it was in fact PW8 who had the clearest opportunity to harm the deceased because he was in the house the whole time although he did not suspect PW8 as he had always been loyal to him.

[54] The accused said although he confirmed that PW8 had knocked on the door of his room at 5pm, this was not stated in his notice of alibi because at the time he gave his notice of alibi which was in April of 20181 he thought that he only had to disclose his whereabouts at the time of the incident and not a precise record of his movements. The accused said that after having heard the testimony of witnesses he now agrees that PW8 had knocked on his door at around 5pm.

[55] The accused also said that it was in fact Farah that would frequently send the deceased to him to look after because she did not want Mohd Zafil (PW1) to look after the deceased as they had already divorced. According to the accused, it was untrue that he had always asked PW7 to send the deceased to him. If what PW7 said about him hurting the deceased was true it made no sense why she would frequently request for him to look after the deceased. He also said that he had developed an intimate relationship with the deceased and that she referred him as 'Pa'.

[56] The accused in his defence also said that even though PW7 said that there were requests made by him through messages on the handphone to send the deceased to him, but until the trial ended, no handphone was produced in court in order to substantiate this allegation. In fact, the accused said that the police who had taken possession of his hand phone had lost it.

[57] On the allegations by PW2 levelled against the accused for sexual abuse of the deceased, the accused said that were untrue. Besides himself, the deceased was also in the care of others, namely, PW1, PW2, PW5 and PW8.

[58] The accused also in his defence said that according to Dr Ahmad Afizam ('PW12') and exh P12, the injuries to the back of the deceased's head were new injuries that probably occurred 72 hours prior to her death.

[59] Therefore, the accused then gave a narration of events that took place starting from 3 November 2015 onwards where he said that his aunties were with him that day when PW7 asked one of his aunties regarding some stains on the deceased's bottom to which his aunty replied that they were dried stains of faeces. The accused said that that night PW7 took the deceased away with her to her father's house. On 4 November 2015 in the morning, PW7 came to the accused's house with the deceased. He then went to the Syariah court together with PW7, PW8 and the deceased and they returned around 2.30pm. PW7 and the deceased then left the house, which according to the accused, roughly around the time Roslan ('PW10') telephoned him regarding the purchase of some cattle. PW7 came again at night and left the deceased with the accused.

[60] After that, the deceased was placed in the care of the accused's aunties. The accused said at the time, Fatin was also present. At around 11.30pm, the accused said that PW10 and PW11 arrived at his house after which all of them the deceased proceeded to Paka, Terengganu. The accused said that coincidently, his aunties who had just finished treatment at the Selayang Hospital also followed them where they were dropped off at Kuantan at dawn on 5 November 2015. Upon reaching Terengganu, the accused said that he then transacted with PW10 regarding the cattle purchase after which they had a meal at Paka where he sent a picture of the deceased to PW7. The accused said that PW7 spoke to the deceased over the phone.

[61] According to the accused, they reached his house on 6 November 2015 at around 5am PW10 and PW11 went to sleep in a guest room that PW8 used to keep his clothing's while PW8 slept in the living room. At that time, the deceased was not sleepy thus the asked Fatin to look after her before she went to work. The accused said that he told Fatin to let the deceased watch television while he went to sleep.

[62] At around 9am, the accused woke up to find that Fatin had left for work and that the deceased was asleep. The accused noticed that PW10 and PW11 were nowhere to be found and when he messaged them they said that they had left the house and did not wake him as they did not want to disturb his sleep. The accused then make some milk as the deceased would look for milk after she awoke from sleep. The accused then went back to sleep.

[63] The accused denied that he was responsible for the external injuries listed in exh P12 tendered through PW12. The first time he heard about the injuries was when it was read out in court. The accused said that Farah had complained to him about a maid who had previously looked after the deceased and who was cruel to her. When he heard this, the accused asked her to change the maid but Farah instead had asked him to look after the deceased.

A FINDINGS OF THE LEARNED JC AT THE CONCLUSION OF THE TRIAL

[64] At the conclusion of the trial, the learned High Court judge found that the accused had failed to raise any reasonable doubt to the prosecution's case and that the prosecution had successfully proven the case against the accused beyond a reasonable doubt. Thus, the accused was found guilty and convicted of the charge against him. Consequently, the accused was sentenced to death.

[65] On the accused's alibi, the learned High Court judge held that the alibi was concocted and fabricated by the accused in order to place him away from the scene at the material time. The alibi is therefore rejected and neither does it raise a reasonable doubt in the prosecution case.

[66] It was also held that there was nothing from the defence to displace the 'last seen together' principle. The learned High Court judge further stated in his judgement that the evidence is undoubtedly circumstantial in nature. Most crimes are by their very nature committed in secret and behind closed doors and away from the public gaze. If every conviction depended upon direct evidence there would be no convictions for crimes for want of eye witness evidence. It is to meet this necessity and to cure the obvious injustice that arises out of this situation that the common law developed the concept of circumstantial evidence. However, that circumstantial evidence can only be used to convict where all the strands of evidence pointed to only one conclusion and one conclusion only which is that it was the accused and nobody else who was responsible for the crime that took place ie the irresistible conclusion test.

[67] The learned High Court judge also held that while no clear motive can be shown here, this does not prejudice the prosecution case as all the evidence, circumstantial though it may be, pointed to one and only one conclusion and that is it was the accused who was responsible for the murder of the deceased.

H THE APPEAL

[68] Aggrieved with the decision of the High Court, the accused filed the appeal, which were set for hearing before us. in his petition of appeal, the accused had raised 22 grounds of appeals.

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[69] For ground 4 and 8 of the petition, the defence raised four main issues which the accused's counsel submitted before us as follows:

(a) first issue: evidences from PW8 show that the deceased was alive at 5.20pm and there is no opportunity for the accused to make any harm to the deceased;

(b) second issue: the learned High Court judge erred when he relied on the evidence of PW8 who testified that at around 3pm, he heard the sound of a girl screaming to conclude the inference that the accused had caused death to the deceased;

(c) third issue: the learned High Court judge failed to consider that the murder can be done by PW8; and

(d) fourth issue: the learned High Court judge failed to consider the nothing in the evidences of PW8, PW10 and PW11 that the deceased had complained or appeared in pain on the day of death or the day before.

[70] For grounds 23 and 24 of the petition, the defence raised two issues as follows:

(a) first issue: the learned High Court judge failed to evaluate the conduct of the accused had raised reasonable doubt against the entire case prosecution; and

(b) second issue: the learned High Court judge erred when concluded that the reason for the accused bring the deceased to the clinic using back door was because he tried to avoid public.

[71] In respect to ground 21 of the petition, the defence also raised two issues as follows:

(a) first issue: The learned High Court judge failed to evaluate that PW7 was an interested witness; and

(b) second issue: The learned High Court judge erred in his decision about the failure of the prosecution to produce the accused's Blackberry phone. According to the defence, such failure would raise an adverse presumption under s 114(g) of the Evidence Act against the prosecution.

[72] The defence further submitted on grounds 7 and 9 of the petition in which their contention is that the prosecution failed to produce material witnesses like Ah Pau, the accused's aunty and Kak Nor to rule out any possibility that they did murder against the deceased since they also have access to the deceased prior to her death.

A DECISION

[73] Of all the four issues raised by the defence in this appeal, we sum up that the main concern of the defence's appeal is the suggestion that the death of the deceased was not caused by the accused but the possibility of the death was caused by someone else like PW8. For that reason, the defence relied on few cases which held that with regard to circumstantial evidence to be relied on for a conviction in capital offence, such circumstances must unerringly lead to one conclusion consistent only with the hypothesis of the guilt of the accused. In other words, in order to secure conviction based on circumstantial evidence, there must not be any other co-existing circumstances which would weaken or destroy the inference of the guilt of the accused. That fact must be such that they cannot be accounted for any other rational hypothesis, other than the guilt of the accused (see the cases of *Public Prosecutor v Ahmad Rizal bin Umar* [2017] 6 MLJ 279; [2017] 1 LNS 1069, *Munesuaran a/l Ramasamy lwn Pendakwa Raya* [2015] MLJU 1958; [2016] 2 CLJ 210 and *Romli Ali v Public Prosecutor* [2017] 6 CLJ 652).

[74] It was submitted by the defence that despite the charge presented by the prosecution stated that the offence committed by the accused starting from 7.30am until 7.30pm, nevertheless, the prosecution does not bring any evidence which can prove that the accused had killed the deceased at the time as stated in the charge. The prosecution never raised the question on how the injury was inflicted and also whether the was a weapon used.

[75] Another point raised by the defence is that when there are two persons who are at a scene, which it cannot be ascertained as to who the individual has caused the injury which caused the deceased to die, then the benefit of the doubt should be given to the accused. In this case, the defence said that all material time, PW8 was with the deceased. The counsel of the accused cited the case of *R v Abbot* [1955] 2 All ER 899 which held as follows:

> ... if two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case, if, in those circumstances, it was left to the defendants to get out of it if they could, that would put the onus on the defendants to prove themselves not guilty, Finemore, J, remembers a case in which two sisters were indicted for murder, and there was evidence that they had both been in the room at the time the murder of the boy committed, but the prosecution could not show that sister A had committed the offence or that sister B had committed the offence. Very likely one or the other must have committed it, but there was no evidence which, and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law should be maintained that the prosecution should prove the case.

[76] Another case referred was *Public Prosecutor v Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576; [1992] 3 CLJ Rep 408 which held as follows:

> Where two or more person are found in a place where an alleged offence is said to have been committed, and if the evidence as to the commission of the offence does not clearly point to one or to the others, it is said that the guilty of neither has been established.
>
> ...
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> the presence of unknown person was as reflected in the evidence adduce, clearly cast a doubt in our mind that the respondent was the one who caused the death of the deceased, we would agree with the learned trial judge that no prima facie case has been made and hence the prosecution was entitled to an acquittal.

[77] On the issue of the accused's conducts when he was at the clinic where he repeatedly requested PW3 to save the deceased, the defence pleaded that the learned High Court judge failed to consider such facts. The defence suggest that the accused's conducts are contrary to the conducts of an individual who intends to cause injury to someone, far from intending to kill someone. If the accused did the murder, he can just run. Thus, this had raised another inference that the accused had not killed the deceased. The defence then said that 'it two evidence admits on two or more inferences, then the inference that is most favourable to the accused should be adopted' as what had been decided in the case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2005] 2 MLRA 590.

[78] According to the accused's defence, PW7 is an interested witness as she had posted on one Facebook page that was created by PW7 herself named 'KEADILAN UNTUK AMANDA'. Therefore, it was submitted that evidence by PW7 must be treated with caution and requires corroboration. In this regard, the defence referred to the case of *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805 and the case of *Liow Siow Long v Public Prosecutor* [1970] 1 MLJ 40; [1969] 1 LNS 98.

[79] With regard to an adverse presumption under s 114(g) of the Evidence Act upon failure of the prosecution to produce the accused's blackberry, the defence counsel submitted that the blackberry is important to prove that it is not the accused who had asked from PW7 to take care of the deceased but PW7 herself had requested the accused to take care of the deceased. Therefore, this evidence can be used to corroborate the evidence by PW7 who is an interested witness. According to the defence, the request had been made to the prosecution for the phone to be produced. However, it was not produced and according to PW15, they cannot locate the whereabout of the phone. The defence cited the case of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; [1987] CLJ Rep 221 which held as follows:

A It is essential to appreciate the scope of s 114(g) of the Evidence Act 1950 lest it be carried too far outside the limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for B non-production of not just any witness but an important and material witness to the case.

[80] On the failure of the prosecution to produce material witnesses like Ah Pau, the accused's aunty and Kak Nor to rule out any possibility that they did C murder against the deceased since they also have access to the deceased prior to her death, the defence submitted that it had prejudiced the accused. According to PW12's evidence, the injuries to the deceased happened less than 72 hours. Therefore, the defence submitted that it is possible for the deceased to have sustained those injuries in the last 72 hours of her life as opposed to the last D 24 hours and someone else apart from the accused could have caused the injuries within that time.

[81] Of all the issues raised by the defence with regards to the grounds of E appeal, the prosecution submitted that from the evidence adduced by the prosecution, the intention of the accused to cause bodily injury is proved as per the witnesses' evidence. Even though there are no direct eye witnesses, the prosecution relied on the circumstantial evidence that is rather glaring and which led to the guilt of the accused as follows:

F (a) PW1 and PW2 had last seen the deceased on the 19 October 2015. PW1 and PW2 had noticed that there were bruises on the deceased's body whilst in their custody in between 17 to 19 October 2015;

(b) PW7 testified that the accused had requested and urged to take care of G the deceased several times. PWT's evidence was consistent when she was cross-examined by the defence counsel. PW7 has two children of her own. If the accused was really sincere or has the kind intention to assist PW7 in taking care of her children or rather lightening her burden, then why was the accused only interested and badly wanted to take care of the H deceased who was barely two years old as compared to her sister, FA who was four years old back in 2015;

(c) the evidence adduced by the prosecution was never rebutted by the defence that the accused had asked personally from PW7 for the deceased to be in his care and custody. There was no dispute that the I deceased was with the accused on 6 November 2015. PW7 described the last moment she had to leave the deceased with the accused, the deceased was crying frantically. She realised that the deceased was always crying when she parted with her in the care of the accused. This evidence corroborated by PW8's testimony that the deceased always screamed

whenever she was bathed by the accused as opposed to the experience related by PW1, PW2, PW5 and PW7 whenever they handled the accused;

(d) there is no iota of evidence that this evidence of PW10, PW11 and PW8 was challenged ie the fact that the deceased was with the accused at all material time from the 5 November 2015 up to the fateful day of her death 6 November 2015. Witnesses corroborated each other that they saw the accused carried the deceased to his room upon arriving at his house from Terengganu;

(e) based on the 'last seen together' principle, where the accused was the last seen person with the deceased, in the absence of any plausible explanation by the accused, it could lead to a presumption of guilt although this is not necessarily conclusive. The prosecution has proved that the deceased was with the accused since they returned from Terengganu to Kuala Lumpur in the morning of 6 November 2015. This evidence was not challenged and the last seen principle ie that PW8 saw the deceased in the bedroom with the accused and that PW8 heard the deceased screamed was never rebutted by the defence;

(f) according to PW3, the accused had requested him to issue a death certificate in order to bury the deceased but PW3 refused to do so due to the injuries sustained which were at the back of the head, on the forehead and legs. PW3 then suggested to the accused that the deceased be sent to a hospital for a post mortem as he suspected of child abuse. The accused then informed PW3 that he was a policeman and insisted that the deceased's death certificate to be issued by PW3;

(g) the defence also do not proceed to impeach the credibility of PW8 if at all PW8 was an unworthy witness of the prosecution. Therefore, it is submitted by the prosecution that PW8 is a reliable witness. PW8's testimony was consistent and not shaken;

(h) from the evidence of PW12, the deceased was a two-year-old girl had sustained four severe blows on her head — two on top of her head, one on both sides of the head and the fatal one at the back of her head. PW12 had explained that all these injuries sustained less than 72 hours. PW12 also had explained that with these kind of injuries, one can either go into unconsciousness immediately (which did not happen in this case), the child can feel the pain and get into a seizure (which happened in this case — PW8 heard the deceased screamed and then saw she went into a fit) on that very day of 6 November 2015 or in pain and vomited. This correspond to the testimony of PW12. There was no evidence of PW8, PW10 or PW11 to infer/indicate that the severe injuries were inflicted upon the deceased before 6 November 2015. Thus, it was submitted by the prosecution that the injuries inflicted were of a kind that was

sufficient in the ordinary course of nature to cause death and that the intention to cause such bodily injuries as those inflicted upon the deceased were not accidental;

(i) as for the evidence by PW7, the prosecution submitted that it was clear that she wanted justice be seen to be done for her deceased daughter. About her Facebook postings, which was not tendered in accordance to the provision of s 90A of the Evidence Act, thus it goes to the weightage and the prosecution seek that this court should not rely upon it. PW7 had explained that as a mother that was the only way for her to express her grievances and seeking justice for her demised daughter. The learned High Court judge had seen the demeanour of PW7 which showed that PW7 had given reliable and truthful evidence;

(j) PW9 was called to ascertain the accuracy of the time as alleged in the notice of alibi exerted by the defence that the water leakage happened at 3pm. PW9 testimony was consistent with that of PW8 that the water leakage happened at about 5.20pm as PW9 had just came back from his Asar prayer at that time and not before that. PW8 and PW9's testimony was not challenged by the defence; and

(k) even though there were several people who were with the deceased less than 72 hours, they did not have exclusive custody of the deceased, the accused did. The contention that there was another person who did it other than the accused is just a mere contention.

[82] The prosecution further submitted that as for some discrepancies in the testimonies of the prosecution witnesses, this court should be cautious on the fact that this case had happened in 2015, that is five years ago and the memories of some of the witnesses are weak on certain points. In this regard, this court should consider the age of the witnesses and their ability to remember after a long period of time. The prosecution referred to the case of *Tua Kin Ling v Public Prosecutor* [1970] 2 MLJ 61 which held as follows:

> No doubt the rule is that if a witness had lied on one or two points it does not necessarily follow that his whole evidence should be rejected (*Khoon Chye Hin v Public Prosecutor*). But it is the duty of the court to sieve the evidence and to ascertain what are the parts of the evidence tending to incriminate the accused which couid be accepted.

[83] We are well aware that we should not normally disturb the findings of fact made by the lower court. However in the Court of Appeal case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 it is said as follows:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. *But appellate interference will take place in cases where there has*

been no or insufficient judicial appreciation of the evidence. (Emphasis added.)

[84] After scrutinising on the totality of the evidence, we are of the view that there is a need for appellate intervention in this appeal before us. We find that the High Court was wrong in convicting the accused for murder under s 302 of the Penal Code.

[85] We agreed with the learned High Court judge on the application of the 'last seen together principle'. However, only to a conviction for the lesser offence of culpable homicide not amounting to murder under s 304(b) of the Penal Code was justified considering the weight of the evidence tendered by the prosecution. There was certainly no evidence of any premeditation or preexisting malice on the accused towards the deceased.

[86] In arriving to our decision, we are guided by the decision of the Federal Court on the distinction between murder and culpable homicide in the case of *Mickelson Gerald Wayne v Public Prosecutor* [2022] 6 MLJ 118 which held as follows:

> The two broad categories are murder and culpable homicide not amounting to murder. Murder is, of course, the gravest form of culpable homicide. Where the offence committed is without the characteristics of murder, then it may be a lesser offence of culpable homicide not amounting to murder. So, not all culpable homicides amount to murder although all murders are culpable homicides. However, and this is significant, each of the offences are not defined separately but expressed as one being a graver form of the other.

[87] The Federal Court in the above case further explained on the degrees of criminality as follows:

> [49] Characterised as such, it follows that there are really three degrees of criminality when it comes to culpable homicide. The first is murder which is punishable with death under s 302 of the PC. The second category is the offence under s 304(a) of the PC, which for convenience should be referred to as culpable homicide in the second degree, and which is punishable with imprisonment for up to 30 years. The third category is the offence under s 304(b) of the PC, which for convenience may be labelled culpable homicide in the third degree, and which is punishable with imprisonment for up to ten years. This distinction commended itself to the authors of *Ratanlal & Dhirajlal's Law of Crimes* (27th Ed) Vol 2, p 1415 who alluded to several Indian cases and observed that it would be the degree of probability of death which determines whether the culpabie homicide falls within the 'gravest, medium or the lowest degree'.

[88] On how an act is regarded as mere culpable homicide under s 299 of the Penal Code and one that is murder under s 300 of the Penal Code, useful explanation is found in *Ratanlal & Dhirajlal's Law of Crimes* which stated as

follows:

> The distinction lies between bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real and if overlooked may result in miscarriage of justice. Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim is sufficient to bring the killing within the ambit of this clause. The difference between section 299 and clause (3) of section 300 is one of the degree of probability of death resulting from the intended bodily injury. The clause (4) of section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons, being caused from his imminently dangerous act approximates to a practical certainty, such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

[89] We further refer to the case of *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 in which Raja Azlan Shah FJ (as HRH then was) at p 176 stated as follows:

> We therefore intend to deal at some length to emphasise and to discuss the distinctions between the provisions of s 299 of the Penal Code and s 300 of the Penal Code.
>
> s 299, Penal Code enacts that a person commits culpable homicide, if the act by which the death is caused is done: (a) with the intention to cause death; (b) with the intention of causing such bodily injury as is *likely* to cause death; (c) with the knowledge that ... the act is *likely* to cause death.
>
> Section 300, Penal Code defines murder as follows. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done: (1) with the intention of causing death; (2) with the intention of causing such bodily injury as the offender *knows to be likely* to cause the death of the person to whom the harm is caused; (3) with the intention of causing such bodily injury to any person, and ... *is sufficient in the ordinary course of nature* to cause death; (4) with the knowledge that the act is so *imminently dangerous that it must in all probability* cause death, or such bodily injury as is likely to cause death.
>
> The words which I have italised show the marked differences between the two offences. Where there is an intention to kill, as in (a) and (1), the offence is always murder. Where there is no intention to cause death or bodily injury, then (c) and (4) apply. Whether the offence is culpable homicide or murder depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder. Illustration (d) of s 300 of the Penal Code is a case of this description. Where the offender knows that the particular person injured is likely, either from peculiarity of constitution, immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death, it is murder. Illustration (b) of s 300 of the Penal Code is a good example. The essence of (b) and (3) is this. It is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder, if such injury is sufficient in the

ordinary course of nature to cause death. Illustration (c) given in s 300 of the Penal Code is an example. It is on a comparison of these two limbs of s 299 and s 300 that the decision of doubtful cases as the present must generally depend. The distinction is fine, but noticeable. In the last analysis, it is a question of degree of probability.

A comparison that frequently arises in the application of ss 299 and 300 is the tenuous contention that s 299 is not a substantive offence and therefore an offence is either murder or culpable homicide according to whether or not one of the exceptions to s 300 apply, and if by reason of the absence of the necessary degree of mens rea an offence does not fall within s 300, it cannot be one of culpable homicide not amounting to murder punishable under s 304 of the Penal Code, but would amount to causing grievous hurt. In our view, the correct approach to the application of the two sections is this. Section 299 clearly defines the offence of culpable homicide, Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to s 300 of the Penal Code apply, and (b) where the necessary degree of mens rea specified in s 299 is present, but not the special degrees of mens rea referred to in s 300 of the Penal Code. We would like in this connection to express the need to bear in mind that all cases falling within s 300 of the Penal Code must necessarily fall within s 299, but all cases falling within s 299 do not necessarily fall within s 300. The first part of s 304 of the Penal Code covers cases which by reason of the exceptions are taken out of the purview of s 300, cll (1), (2) and (3) but otherwise would fall within it and also cases which fall within the second part of s 299, but not within s 300, clauses (2) and (3). The second part of s 304 of the Penal Code covers cases falling within the third part of s 299 not falling within s 300, clause (4).

[90] Therefore, from the material facts of this case together with the evidences tendered before the court and guided by the above decision of *Tham Kai Yau & Ors v Public Prosecutor*, we are of the considered view that in order to convict the accused under s 302 of the Penal Code, we have to satisfy that the accused had committed murder as provided under s 300 of the Penal Code. In this regard, culpable homicide may not amount to murder: (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to s 300 of the Penal Code apply; and (b) where the necessary degree of mens rea specified in s 299 is present, but not the special degrees of mens rea referred to in s 300 of the Penal Code.

[91] We are not with the learned High Court judge in his finding that the facts and circumstances raised strong inference that the accused had intention of inflicting bodily injury to the deceased and the bodily inflicted was sufficient in the ordinary course of nature to cause death pursuant to limb (c) to s 300 of the Penal Code. We find that the prosecution failed to prove the element of intention in this case. Nothing in the facts suggested that the accused had an intention to inflict the injury to the deceased. Thus, the question arose as to whether the accused's act fell within limb (d) which only require that the accused knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death?

[92] After careful consideration, we find that in this case, the special degrees of mens rea referred to in s 300(d) is not satisfied. We are of the view that the evidence by the prosecution is lack in proving that the accused acquired knowledge that his act *is so imminently dangerous that it must in all probability* cause death, or such bodily injury as is likely to cause death. We have taken this from the fact that PW8 heard the child scream at around 3pm PW8 also testified that the deceased was alive at about 5.20pm PW8 also saw the deceased lying down holding a milk bottle in front of the television after that. Therefore, our inference from this evidence of PW8 is that the accused is lack of knowledge that the injury inflicted on the deceased is imminently dangerous that it must in all probability cause death or likely to cause death. In *Ratanlal & Dhirajlal* at p 1302, if the case cannot be placed as high as that and the act is only likely to cause death and there is no special knowledge, the offence comes under the second part of s 304 of the Indian Penal Code.

[93] On the other issues raised by the defence counsel, we agreed with the finding of the learned High Court judge. It is worth to note that even though the defence argued on the point that there are two persons in a place where an alleged offence is said to have been committed (ie the accused and PW8) and the defence suggestion that it was PW8 who had killed the deceased. However, in our view, PW8's evidence is clearly admissible. PW8's evidence was neither self-exculpatory nor accusing the accused. His evidences were only as to what within his knowledge and nothing in the record stated that PW8 was shaken when he was cross-examined. In this regard we have to remind ourselves that as a trier of fact, the learned High Court judge had the audiovisual advantage reserved to a trial judge.

[94] In the circumstances, the learned High Court judge had correctly examined the evidence adduced before him and had also correctly applied the principles when assessing circumstantial evidence. Therefore, we do not disturb the finding of the learned High Court judge who relied on the evidence of PW8 since PW8 was held to be a reliable witness.

[95] All in all, although the case depended entirely on circumstantial evidence, the evidence in totality pointed to the fact that the accused was guilty as charged. The accused failed to cast a reasonable doubt on the truth of the prosecution case.

CONCLUSION

[96] In the upshot, having perused the appeal records, the grounds of judgement and the written submissions by parties, we found merit in the appeal canvassed before us and we unanimously find that the sentence and conviction against the accused under s 302 of the Penal Code was not justified

and palpably unsafe. Accordingly, we set aside the conviction and sentence for murder and substituted it with a conviction for culpable homicide not amounting to murder under s 304(b) of the Penal Code. After considering the mitigation plea and submissions in reply, we imposed a sentence of ten years' imprisonment with effect from date of 9 January 2018.

Appeal allowed.

Reported by Dzulqarnain Ab Fatar